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(5)

Supreme Court, U.S.
FILED
FEB 28 2001
CLERK

No. 00-919

IN THE

# Supreme Court of the United States

WALTER S. STEVENSON,
United States Navy (Retired),
*Petitioner*,

*v.*

UNITED STATES OF AMERICA,
*Respondent*.

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On Petition for Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

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## REPLY BRIEF FOR THE PETITIONER

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The decision of the Court of Appeals for the Armed Forces squarely conflicts with this Court's case law prohibiting non-probable cause intrusions solely to aid criminal investigations. Respondent does not contest the existence of this conflict. Nor does it challenge the important issues raised by the petition. Rather, it attempts to divert this Court by arguing that the claim was not addressed below and is not ripe for review. Respondent also creates, without citing a case, a "plausible objective" test for examining the military's need to conduct non-probable cause searches and seizures. These misguided arguments must not dissuade this Court from granting review.

1. Respondent incorrectly asserts (Br. in Opp. 8, 12-13) that the court of appeals did not address petitioner's claim by misconstruing his argument and the court's opinion. As an initial matter, petitioner does not allege that the court of

appeals ignored his privacy rights by failing to address them. He asserts the court employed an erroneous standard to determine whether NCIS violated his Fourth Amendment rights by conducting a non-probable cause search and seizure of his blood for DNA evidence. The jurisdictional contacts used by the court, as the petition explains (at 9-13), are not sufficient military needs to permit such an intrusion. Thus, the court addressed his Fourth Amendment claim, but did so under an erroneous standard.

Respondent similarly misconstrues the court of appeals' decision to conclude that the court did not address petitioner's claim. The court found that intrusions under Mil. R. Evid. 312(f) raised two Fourth Amendment issues. The first issue was whether NCIS could conduct a non-probable cause search and seizure of petitioner's blood for "valid medical purposes." Pet. App. 6a-8a. The court answered affirmatively, holding that "if some of the blood in the first vial was made available to the NCIS for its investigative purposes, any evidence relating thereto would be admissible."[1] Pet. App. 8a. The second issue concerned the means in which the evidence was seized—that is, whether "the prolonged intrusion of the needle in appellee's [petitioner's] arm while a second vial was placed on the vacuum needle . . . was a *de minimis* intrusion." *Id.* That issue was remanded to the trial court.[2]

The remand of the second issue, contrary to respondent's brief (Br. in Opp. 8), does not affect the court of appeals' consideration of the first issue, which is the basis of the petition. That issue was squarely answered and rejected when

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[1] This conclusion, as stated in the opening brief (at 9, 13), ignores and necessarily rejects this Court's holdings that an examination of body fluid is a second intrusion. *See Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987); *see also Minnesota v. Dickerson*, 508 U.S. 366, 378 (1993) (pat-down search strictly limited to the exigency that give rise to the search).

[2] As will be discussed *infra* in section 2, this second issue is illusory and does not provide petitioner any possible relief. It does not affect the ripeness of petitioner's claim.

the court held that Mil. R. Evid. 312(f) allowed NCIS to search and seize petitioner's blood for DNA evidence. Pet. App. 8a. The second issue concerning the needle intrusion is unrelated to and does not impact the first question.

Moreover, the court of appeals necessarily addressed petitioner's claim by rejecting the Navy-Marine Corps Court of Criminal Appeals's decision. That court held that while Mil. R. Evid. 312(f) applies to members of the temporary disabled retired list [TDRL] (Pet. App. 20a), the rule's application to the facts of this case violated the Fourth Amendment because the military lacked a special need or exigency to conduct such an intrusion. Pet. App. 21a. If the court of appeals merely found the Military Rules of Evidence to be applicable, a finding with which the Navy-Marine Corps court agreed (Pet. App. 20a), then it had no basis to reverse the Navy-Marine Corps court's decision. Respondent's contrary argument cannot impact this Court's decision to grant review.

2. Respondent also attempts to dissuade this Court from granting review by challenging the ripeness of petitioner's case. Respondent does not, and cannot, question this Court's authority to review a non-final judgment of the military court of appeals under 28 U.S.C. § 1259. Rather, it alleges (Br. in Opp. 8-9) that review would be premature because the court of appeals remanded this case for a factual determination and, even if petitioner is convicted, he can seek review at that time. These allegations are misguided.

First, notwithstanding the remand, petitioner's case is ripe because the remanded issue cannot be decided in his favor. *See, e.g.*, *Mills v. Alabama*, 384 U.S. 214 (1966) (a state court's interlocutory decision is final when there are no contested issues on remand). The remanded issue—whether the prolonged needle intrusion had a *de minimis* impact[3]—

[3] Respondent wrongly asserts (Br. in Opp. 8) that the court of appeals remanded this case for a determination of whether there was a Fourth

merely focuses on whether the means used to draw blood is an unreasonable intrusion. This issue has long been decided against petitioner. *See United States v. Fitten*, 42 M.J. 179, 181 (C.M.A. 1995) (citing *Schmerber v. California*, 384 U.S. 757, 771-72 (the taking of blood was a reasonable intrusion)).

Second and more importantly, the jurisdictional statute for this Court's review of military cases, 28 U.S.C. § 1259, will likely preclude future review, a fact effectively conceded by respondent. Br. in Opp. 8 n.2. As the petition noted (at 16-17), this Court can only review military cases in which the court of appeals grants discretionary review. This event is not likely because petitioner's current claim has already been granted and rejected by the court. The court also refused to reconsider its decision, making review even less likely. Pet. App. 34a. Indeed, the only unaddressed Fourth Amendment issue left for petitioner, as discussed *supra*, involves an issue decided by this Court thirty-some years ago. This potential loss of a claim alone makes this case ripe and compels this Court's grant of review. *See Solorio v. United States*, 483 U.S. 435 (1987) (this Court granted review of a military case in the same procedural posture as this case).

3. Finally, respondent's argument with regards to the merits misses the mark. As explained in the petition (at 9-10), non-probable cause searches and seizures are permitted only in extraordinary cases. *See Chandler v. Miller*, 520 U.S. 305, 313-14 (1997); *see also City of Indianapolis v. Edmond*, 531 U.S. ___, ___, 121 S.Ct. 447, 451 (2000). Such intrusions satisfy constitutional scrutiny only when the government has a substantial need to conduct the search and seizure, beyond ordinary law enforcement, and that need outweighs the

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Amendment violation based on the taking of the second sample for "law enforcement purposes." The court remanded only to examine "in light of *Fitten*—whether the prolonged intrusion of the needle in appellee's arm" violated the Fourth Amendment. Pet. App. 8a. The law enforcement aspect of the intrusion plays no part in the remand.

individual's privacy interests. Pet. 10.

Respondent does not challenge the applicability of this standard here. Nor does it contest that the Fourth Amendment applies to petitioner. Br. in Opp. 9 n.4. Instead, it concludes, without citing a single case, that NCIS's search and seizure of petitioner's blood for DNA evidence is permissible because diabetes check-ups serve a "plausible military health care objective." Br. in Opp. 12. The test, however, is not whether the military has a "plausible objective." It is whether the military has a substantial need to conduct the intrusion. As discussed in the petition, no such need is present in this case.

Moreover, respondent's analysis overlooks the necessity of showing that the individual subject to the non-probable cause intrusion plays a direct role in the interest being safeguarded by the intrusion. *See National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 672 (1989) (search and seizure caused by urinalysis program only permissible for employees "who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty."). Such a direct role to the military's mission cannot exist when a retiree or member of the TDRL "may be recalled to active duty."[4] Br. in Opp. 11. Respondent also fails to explain how a search for DNA relates to any health care objective.[5] *See Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987); *see also*

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[4] Although respondent criticizes petitioner's statement that the court of appeals' decision "affects the rights of all retired military personnel" (Br. in Opp. 11), its criticism is unjustified. If the court of appeals can suspend the Fourth Amendment rights of TDRL members based on the minimum contacts of jurisdiction, then it can take the same action against retirees, who also are amenable to court-martial jurisdiction. *See* Article 2(a)(4), Uniform Code of Military Justice, 10 U.S.C. § 802(a)(4) (1998).

[5] Respondent asserts (Br. in Opp. 12-13) that the court of appeals did not address this issue and it is not ripe for review. These arguments, like those discussed *supra* (at 1-5), lack merit. The court clearly rejected this impermissible nature of the DNA search by holding that NCIS could conduct any search on the blood once it was obtained. Pet. App. 8a.

*Minnesota v. Dickerson*, 508 U.S. 366, 378 (1993) (pat-down search strictly limited to the exigency that give rise to the search). Ultimately, NCIS search and seizure of petitioner's blood for DNA evidence was a search for criminal evidence without probable cause. It cannot withstand constitutional scrutiny.

## CONCLUSION

For the reasons stated above, and those set forth in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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February 2001